United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

76

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CASE NO. 24,235

UNITED STATES OF AMERICA, Appellee.

V.

FREDERICK THORNTON, JR., Appellant.

BRIEF FOR APPELLANT

ROBERT L. HEALD
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(Appointed by the Court)

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SEPTEMBER 1, 1970

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I

STATEMENT OF ISSUES

(1) The absence of counsel at a pretrial photographic identification was a denial of Appellant's right to the assistance of counsel guaranteed by the Sixth Amendment.

(2) The admission of the pretrial photographic identification, under the circumstances of this case, constituted a denial of the due process of law guaranteed by the Fifth Amendment.

(3) The Court's determination that Appellant was competent to stand trial was erroneous.

(4) The Court erred in failing to order, sua sponte, an examination to determine Appellant's mental condition at the time of the commission of the offense.

(5) The withholding of evidence affecting the credibility of a witness denied Appellant due process of law guaranteed by the Fifth Amendment.

(This case has not previously been before this Court.)

REFERENCES TO RULINGS

1. Motion to suppress the pre-trial identification for undue suggestiveness. (Tr. 58)(Denial Tr. 62).

2. Defense attorney's objection to adequacy of competency examination of defendant and examination of examining psychiatrist. (Tr. 62-63, 65-76).

II

STATEMENT OF THE CASE

This is an appeal arising from a criminal trial (Criminal Case No. 488-69), before a jury, held in the United States District Court for the District of Columbia. Appellant was indicted on five counts: (1) murder while perpetrating the crime of attempted robbery; (2) second degree murder; (3) attempted robbery; (4) assault with a dangerous weapon; and (5) carrying a dangerous weapon, all charges arising out of events of June 22, 1967.

Around 10:45 on June 22, 1967 (D.C. Tr. 25), two men entered Mosby's Jewelry Store (D.C. Tr. 7, 176, 194).[1/] Once inside the store, it took them two to three minutes to reach the watch counter where Mrs. Mosby was standing (D.C. Tr. 27). Miss Sadie Luber, an old friend of Mrs. Mosby, was at this time seated in a chair across from the watch counter (D.C. Tr. 27, 193). Whether she got up or not at this time escaped her memory (D.C. Tr. 241, 242). While the two men were approaching the counter, Miss Luber noticed nothing unusual about them (D.C. Tr. 27, 30, 212, 213). The number one man, alledgedly Appellant, engaged Mrs. Mosby in a conversation about a watch (D.C. Tr. 9, 29, 181), this conversation lasting between two and three minutes (D.C. Tr. 27). Mrs. Mosby went to obtain a battery for the watch (D.C. Tr. 194). When she began to return, the man drew his gun and shot her (D.C. Tr. 11, 29). The assailant then turned and fired two shots at Mr. Mosby who was in the rear of the store

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1/ References are to transcript of lower court proceeding.

(D.C. Tr. 12, 179). Before the shooting, the second man had moved to the rear of the customer area where he had declined Mr. Mosby's offer of help, saying he was with the other man (D.C. Tr. 10, 181, 196). Immediately after the discharges both men ran out of the store (D.C. Tr. 243) taking nothing (D.C. Tr. 29, 182).

For eighteen months the case went unsolved (D.C. Tr. 21). Then, relying on information supplied by Mr. Erskine Pittman (D.C. Tr. 255), the police secured Appellant's photograph along with five others and went to Mosby's Jewelry Store (D.C. Tr. 55, 343). There, Miss Sadie Luber identified the Appellant from his photograph as Mrs. Mosby's assailant (D.C. Tr. 51, 55, 343). Appellant was soon afterwards arrested (D.C. Tr. 350). Defense attorney moved to have the photographic identification excluded from being admitted (D.C. Tr. 58). This motion was denied (D.C. Tr. 62).

During the trial a thirty minute cellblock examination was conducted to determine Appellant's competency (D.C. Tr. 68, 69). Defense counsel objected to the finding of competency (D.C. Tr. 65). A hearing was subsequently held after which the lower court let stand this finding of competency (D.C. Tr. 63, 65, 66A-76).

The trial commenced on April 1, 1970 and continued on April 2 and April 6, 7 and 8 and on April 9, 1970, the jury returned a verdict of not guilty on the second count. A verdict of guilty was entered as to the first, third, fourth and fifth counts and Appellant was sentenced to life imprisonment.

This proceeding seeks review of the verdict and sentence below.

III

ARGUMENT

A. The Absence of Counsel At a Pretrial Photographic Identification Was A Denial of Appellant's Right To The Assistance of Counsel Guaranteed By The Sixth Amendment.

It is now recognized that an accused is entitled to the assistance of counsel at all lineup confrontations. Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967); United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). The necessity for this protection is twofold: (1) To prevent undue suggestiveness and (2) to aid the accused in establishing his defense. Clemons v. United States, 133 U.S. App. D.C. 27, 408 F.2d 1230 (1968), cert. den. 394 U.S. 964, 89 S.Ct. 1318, 22 L.Ed.2d 567 (1969). It is submitted that the same rationale requires the presence of counsel at a pretrial identification made through photographs. In United States v. Hamilton, 420 F.2d 1292, 1295 (U.S. App. D.C. 1969), this Court, while affirming the admissibility of such an identification, stated: "We are mindful, nonetheless, of the hazards inherent in the use of photographs for purposes of identification, which appellant emphasizes, and of the consequent need for care whenever that process is employed." It also stated in a footnote: "The problem here is similar to that obtaining when an accused is placed in a lineup without benefit of representation by counsel."

The need for counsel at such a pretrial identification has been recognized. In Thompson v. State, 85 Nev. 134, 451 P.2d 704 (1969), the court held ". . .that a lineup of photos and a lineup of people are to be accorded the same treatment insofar as the constitutional safeguards

required by United States v. Wade are concerned, i.e., the presence of counsel, a waiver thereof, or an adequate substitute for his presence. Without such protection or a waiver of it, constitutional error occurs."

Under the principle established in Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968), the pretrial identification would be set aside only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. In United States v. Hamilton, supra, this Court was confronted with the problem of pretrial photographic identifications. It suggested controls on the number and types of photographs used, the physical characteristics of the individuals depicted, and the recurrence of the same photographed subject. Both the Supreme Court and this Court have recognized the evils that can flow from an improper pretrial photographic identification.

In the instant case, the need for counsel at the pretrial identification was particularly acute. The meeting with the witness was not an identification session designed to narrow the field of suspects (D.C. Tr. 48-53). There was one person in particular whom the police wanted identified. At this point, the prosecutorial process had centered on Appellant.[2/] The right of Appellant to have his counsel present at this stage of the proceeding was not an obvious impracticality but a constitutional safeguard. See, Miranda v. Arizona, 384 U.S. 436, 86 S.Ct.

2/ Compare United States v. Hamilton, supra, n. 6 at 1294: "Counsel at an identification session designed to narrow the field of suspects, at a time when on [sic no] one has been charged and there is no one in particular to represent, is an obvious impracticality."

1602, 16 L.Ed.2d 694 (1966). The evils of such an improper identification can be eliminated in no other way. It is submitted, therefore, that the failure to afford Thornton an opportunity to have his attorney present was a denial of the Sixth Amendment's right to assistance of counsel.

B. The Admission Of The Pretrial Photographic Identification, Under The Circumstances of This Case, Constituted a Denial Of The Due Process of Law Guaranteed By the Fifth Amendment.

In any event, under the circumstances of this case, it is submitted that the admission in evidence of the pretrial photographic identification, as well as the subsequent in-court identification, was clearly erroneous. As stated above, the identification occurred after the police felt that Thornton was the prime suspect and the officer wanted the identification for trial purposes.

This Court has held that the question of whether a pretrial identification procedure was so unduly prejudical as to fatally taint the accused's conviction must be evaluated in light of the totality of the circumstances. The standard of "totality of the circumstances" encompasses a large scope. Factors which come under its umbrella include: whether the accused was masked or unmasked; whether the lighting was good; the proximity of the offense with the identification; the opportunity of the witness to observe the accused during the offense and the length of time of this observation; the ability to identify the accused's clothing; the number of pictures employed; and whether the witness' in-court identification was positively made and firmly adhered to under cross-examination. Simmons v. United States, supra. When these standards are applied to the

instant case, Miss Luber's extra-judicial identification falls short and, therefore, its admission constituted error.

The record in this case reveals that the witness was an elderly woman afflicted with infirmities (D.C. Tr. 435). The photographic identification was made almost eighteen months after the offense occurred (D.C. Tr. 21, 199) and only six photographs were used in the identification (D.C. Tr. 21, 40, 199).[3/] Although not empirically measured, the lighting in the jewelry store was darker than that of the courtroom (D.C. Tr. 39). While in the store, the assailant's back was to the identifying witness for almost the entire time (D.C. Tr. 27, 29, 193-195, 216). In addition, it appears that the assailant was in the store only a few minutes.[4/] During the time the assailant was in the store, Miss Luber paid no particular attention to him until the shot was fired (D.C. Tr. 30, 212, 213). Only then did she see his full face and this for only a split second, as two shots were fired at Mr. Mosby (D.C. Tr. 28, 195). Immediately afterwards, the two men ran out of the store (D.C. Tr. 243). At this point of time, Miss Luber stated that she was shocked (D.C. Tr. 221, 242), was running to the back of the store (D.C. Tr. 30) and was almost knocked down by the fleeing accomplice (D.C. Tr. 243, 246). Yet, she was positive that Thornton was the murderer (D.C. Tr. 203).

3/ The Court in United States v. Hamilton, supra n. 6 at 1294, suggests that six photographs are not sufficient.

4/ This can be determined from the short length of time that passed after the assailants entered the store until they reached the counter (2 or 3 minutes, D.C. Tr. 27); the length and detail of the conversation (D.C. Tr. 144, 211); and its abrupt ending and the immediate flight after the shooting (D.C. Tr. 242, 243).

Most significant is the difficulty the witness had in describing the assailant (D.C. Tr. 201-208, 217-223), depicting him once as light complected (D.C. Tr. 202, 205), once as medium complected (D.C. Tr. 203), and once as dark complected (D.C. Tr. 197, 204). At one time, she recalled he was wearing black shoes (D.C. Tr. 205) and another time she did not remember noticing his shoes (D.C. Tr. 207). At one time, he had on a hat (D.C. Tr. 197, 219, 220), another time it was a stocking cap (D.C. Tr. 229). At one time, she testified the assailant had facial scars (D.C. Tr. 217-219), although Appellant has none. While she testified that Thornton wore a tan coat (D.C. Tr. 205, 206), she also averred that the accused had on a red short-sleeved shirt (D.C. Tr. 205, 222). Taken together, these circumstances demonstrate that it was highly unlikely that the witness had the ability to make an identification of the murderer without her pretrial exposure to the photographs.

As this Court has recognized, once an initial misidentification takes place, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, thus reducing the trustworthiness of subsequent lineup or courtroom identifications. It is submitted that such was the case here and Miss Luber's in-court identification was based on the photograph and not on the person seen. Her description of a light-complected Negro wearing a stocking cap and a tan coat with facial scars, did not resemble Thornton either in the photograph or in person. In the interim between the time of the offense and the time of the in-court identification, almost three years had elapsed. Yet, Miss Luber had no difficulty in identifying Appellant as the assailant despite the inconsistencies in her descriptions.

Under the totality of the circumstances presented, it is submitted that the pretrial identification was too suggestive to permit its admission in evidence. Consequently, her in-court identification, based on this prior identification and having no independent origin of its own, must also fall. Since ". . .a jury inevitably regards evidence of a prior identification as probative of guilt. . . ." Clemons v. United States, supra at 43, 408 F.2d at 1246, the elimination of all testimony concerning both identifications is required to prevent undue prejudice to Thornton's right to a fair trial guaranteed by the Fifth Amendment to the Constitution.

C. The Court's Determination That Appellant Was Competent To Stand Trial Was Erroneous.

In compliance with a request by defense attorney (D.C. Tr. 62), a mental examination was conducted on April 2, 1970. The avowed purpose of this examination was to determine the accused's competency to stand trial. Based on this cellblock examination which lasted between twenty and thirty minutes (D.C. Tr. 62, 68, 69), Dr. Edward C. Kirby, the examining psychiatrist concluded that Thornton was competent to stand trial (D.C. Tr. 62). The Court adopted this conclusion as its own (D.C. Tr. 63, 65).

It is submitted that this examination was insufficient to reach a fair and adequate determination of competency. Without tests (D.C. Tr. 71), without a look into the history of Thornton's life, without an inquiry into the history of Thornton's family, without the use of available records, without an explanation of the dynamics of Thornton's

behavior, and without any insight into his conclusions, a finding of competency cannot stand.

In the District of Columbia, it is the function of the trial judge to determine whether an accused meets the standards of competency set forth in Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed. 2d 824 (1960). While his determination is aided by psychiatrists' reports and testimony, the final decision is his. 24 D.C. Code §301(a) (1967). However, the accuracy of his findings must, and often does, depend on the depth and accuracy of this underlying informational base. Therefore, without sufficient data, it is apparent that the judge cannot make an informed judicial determination of an accused's competency.

In the instant case, the trial judge accepted the psychiatrist's medical report, sight unseen and without inquiry into its scope, although it was only a conclusory statement and failed to explain the dynamics of Thornton's behavior (D.C. Tr. 63). Later testimony by the examining psychiatrist failed to give much insight into the examination conducted. As mentioned before, no tests were administered, this being beyond the scope of the psychiatrist's function (D. C. Tr. 71). In addition, only one record was used in the formation of the doctor's report (D.C. Tr. 68, 69). Yet, it was agreed that the record should always play a part in such a conclusion (D.C. Tr. 70).[5/] When the defense attorney asked the doctor

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5/ In addition to the Area Community Health Center record, the examining psychiatrist could have obtained information from Appellant's police record and the diagnostic reports from those institutions in which Thornton had been incarcerated in helping him discover the scope and depth of the defendant's behavioral disorder.

what specific questions were presented to Thornton, the witness evaded the question by responding in generalities, explaining what he sought to achieve but not how he managed to reach his results. Nor could the psychiatrist give the court or defense counsel any insight into the answers upon which he based his conclusions (D.C. Tr. 71-74).

Besides these infirmities, the mere fact that the examination took place in a cellblock suggests inadequacy of the examination and consequently, the inadequacy of the competency conclusion based thereon. This Court in Cannady v. United States, 122 U.S. App. D.C. 120, 351 F.2d 817 (1965) faced the problem of a cellblock examination after the trial had been completed. Although the psychiatrist was of the opinion that the appellant was competent at the time of trial, he admitted that he neither had adequate facilities nor the time to perform an in-depth examination of the appellant. The court, in reversing, ordered a new examination, with the time and facilities normally made available for pretrial mental examinations to be made available to the appellant. The same result is clearly required in the instant case.

This Court has defined what should comprise a valid mental examination:

> "In determining competency for trial the court must have adequate information on which to base a decision. In 1965, after Whalem and the first Green case, the Judicial Conference, after study, adopted the following recommendations of its committee on mental examinations: 'The report of a court-ordered pre-trial examination should be made in substantial detail, recounting what was done to get at the facts concerning the accused's mental condition and what those facts are, not merely the conclusions the psychiatrists have drawn from the facts.'" Green v. United States, 123 U.S. App. D.C. 408, 414, 389 F.2d 949, 955 (1967).

Judge Wright, with whom Judge Bazelon concurred, dissenting in part and concurring in part, elaborated on the Committee's recommendations:

> "The Committee clearly explained what 'substantial detail' meant. It asked that competency reports include: (1) Names of qualified psychiatrists and qualified psychologists who have examined the accused; (2) the number of examinations and the duration of each; (3) names of all neurological and psychological tests performed, together with a brief description of their results; (4) names of relatives, friends, employers and others contacted, together with brief summaries of the information provided by these sources; (5) a description of contact with and information provided by and to defense counsel and prosecution; (6) a description of the treatment of the defendant, including use of drug therapy; (7) a description of any significant change in the defendant during his commitment, including an evaluation of any incarceration recovery; (8) behavioral description of the defendant's mental condition; (9) names of the professional persons attending the staff conference; (10) the prognosis." Green v. United States, supra at 416, 389 F.2d at 957.

This Court in Rollerson v. United States, 119 U.S. App. D.C. 400, 405, 406, 343 F.2d 269, 274, 275 (1964), also enumerated factors it felt important to consider in assessing a person's mental condition. Included, inter alia, were the administration of tests, an investigation into the personal and familial history of the accused, an explanation of the dynamics of the accused's behavior, and the number and length of examinations. As to the dynamics of one's behavior, Carter v. United States, 102 App. D.C. 227, 232, 252 F.2d 608, 617 (1957) provides further guidance:

> "To make a reasonable inference concerning the relationship between a disease and a certain act, the trier of

> the facts must be informed with some particularity. 6/ This must be done by testimony. . . .The chief value of an expert's testimony in this field, as in all other fields, rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion; in the explanation of the disease and its dynamics, 7/ that is, how it occurred, developed, and affected the mental and emotional processes of the defendant; it does not lie in his mere expression of conclusion. . . ." 8/ (Footnotes added)

While this degree of detail cannot be attained in all situations, courts must, nonetheless, attempt to utilize the most accurate and detailed information at all times. This Court has emphasized the importance of adequate mental examinations:

> ". . .[A] defendant who is subjected to trial while mentally incompetent to understand the charges against him and unable to assist in his own defense has not really been tried at all, certainly not in the sense of a 'fair' trial, which is the basic element of the due process guaranteed by the Constitution." Overholser v. Lynch, 109 U.S. App. D.C. 404, 407, 288 F.2d 388, 391 (1961); rev. on other grounds, 369 U.S. 705, 82 S.Ct. 1063, 8 L.Ed.2d 211 (1962). 9/

6/ An informed determination is also stressed in Winn v. United States, 106 U.S. App. D.C. 133, 270 F.2d 326 (1959), cert. den., 365 U.S. 848, 81 S.Ct. 810, 5 L.Ed.2d 812; reh. den., 366 U.S. 915, 81 S.Ct. 1087, 6 L.Ed.2d 238 (1959). See also, Blunt v. United States, 128 U.S. App. D.C. 375, 389 F.2d 545 (1967); and Whalem v. United States, 120 U.S. App. D.C. 331, 346 F.2d 812, cert. den. 382 U.S. 862, 86 S.Ct. 124, 15 L.Ed.2d 100 (1965).

7/ See, Hawkins v. United States, 114 U.S. App. D.C. 44, 310 F.2d 849 (1962); Whalem v. United States, supra (Bazelon, with Wright, dissenting).

8/ Whalem v. United States, supra, and Rollerson v. United States, supra, also warned against relying on a mere conclusion.

9/ Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); Whalem v. United States, supra; Sanders v. Allen, 69 U.S. App. D.C. 307, 100 F.2d 717 (1938).

The importance of a detailed competency examination in this case cannot be overstressed. If an adequate examination had been conducted below, the Court would have been apprised of Thornton's long history of alcoholism and anti-social behavior. The accused's behavior could then have been appraised in light of his alcoholism and sociopathic diseases. A fair examination would also have discovered the mental problems afflicting other members of the Appellant's family, thereby suggesting a congenital mental defect. Furthermore, his intellectual faculties and memory capacity could be dissected to determine if Thornton actually had a factual and rational understanding of the proceedings against him. Hopefully, tests would be administered to highlight any problems and to obtain insight into the working of this man's brain. As practice has it, a broad competency examination has been a useful vehicle in uncovering information which the defense could utilize in fashioning a plea of insanity. See, Rollerson v. United States, supra at 403, 343 F.2d at 272. This is in keeping with the practice of assuring that all possible defenses are considered. It would also comply with this Court's well established practice of providing indigents all possible safeguards in criminal proceedings.

It is respectfully submitted that, due to a totally inadequate and completely unfair competency examination, Thornton was denied a fair trial in contravention of the Fifth Amendment of the Constitution. It is further submitted that plain error was committed which requires a reversal of the lower court's decision, since an inadequate determination

of competency is not curable by a nunc pro tunc hearing. Dusky v. United States, supra; Wider v. United States, 121 U.S. App. D.C. 129, 348 F.2d 358 (1965).

D. The Court Erred In Failing To Order, Sua Sponte, An Examination To Determine Appellant's Mental Condition At The Time Of The Commission Of The Offense.

The psychiatrist's testimony brought to the lower court's attention that Thornton had undergone treatment at D. C. General Hospital for an acute brain syndrome induced by alcoholism (D.C. Tr. 72). Further evidence of alcoholism was obtainable from the accused's police record.[10/] During the course of the trial, Erskine Pittman testified that whenever he saw his uncle, the latter had been drinking a lot (D.C. Tr. 314), indicating a continuing problem of alcoholism. In addition, William Hubbard testified that around 10:00 a.m. on the day of the offense, the Appellant and he went to a liquor store (D.C. Tr. 369). The logical inference, especially based on the history of Thornton, is that the accused purchased and consumed alcohol on the morning of the offense.[11/] Around 10:45 a.m., the assailants entered the jewelry store (D.C. Tr. 7, 176). Taken singly, none of these facts have much significance. However, when viewed collectively, a pattern of chronic alcoholism crystallizes.

It is submitted that once this information was brought to the court's attention, it was incumbent upon the court to order, sua sponte,

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10/ It is assumed that the court had available Appellant's police record, which reflected a long history of anti-social behavior and alcoholism.

11/ The government affirmed this belief in its closing statement (D.C. Tr. 440).

a complete mental examination of the accused. This obligation is analogous to the court's duty to order a mental competency examination, sua sponte, to determine if the accused is competent to stand trial.

It has long been a principle of law that one who is not of sound mind should not be held criminally responsible. In order to determine whether a person is of sound mind, the courts have standards to aid the jury in its deliberations. In the District of Columbia, the test for insanity was established in Durham v. United States, 94 U.S. App. D.C. 228, 214 F.2d 862 (1954) and consists of two essential elements: (1) the accused must have been suffering from a mental disease or defect at the time of the offense, and (2) the offense must have been the product of this mental disease or defect. Modifications have been made over the years to ameliorate the use of psychiatric labels which in effect resulted in psychiatrists and not the jury determining whether an accused was criminally responsible.[13/]

The rationale for excusing insane persons from criminal responsibility has often been the subject of discussion.

12/ During the course of a trial, if it comes to the court's attention by observation or some other facts that the accused is incompetent to stand trial, there is an affirmative duty to order a competency examination of the accused, sua sponte. Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); Jackson v. United States, 134 U.S. App. D.C. 18, 412 F.2d 149 (1969); Whalem v. United States, supra; D. C. Code 24-301(a).

13/ Washington v. United States, 129 U.S. App. D.C. 29, 390 F.2d 444 (1968); McDonald v. United States, 114 U.S. App. D.C. 120, 312 F.2d 847 (1962).

> "A principal purpose of the statute referred to, 14/ as appears from its terms and legislative history, is to prevent an insane person from being tried or imprisoned for crime. The House Report states that the Act is 'the result of prolonged, patient, and painstaking study and reflection by a constituted committee of judges. . .and representatives of the Attorney General.' Its enactment by Congress is recent affirmation of the ancient principal of law which seeks to avoid the prosecution of an insane person. See 4 Blackstone's Commentaries 24. See also Tatum v. United States, 1951, 88 U.S. App. D.C. 386, 190 F.2d 612, and Davis v. United States, 1895, 160 U.S. 469, 16 S.Ct. 353, 40 L.Ed. 499. Other means than prosecution are provided by law for protecting the interest of the public, and of the individual, when insanity lies behind what otherwise would be criminality." (Footnote added) Perry v. United States, 90 U.S. App. D.C. 186, 187, 195 F.2d 37, 38 (1952). See also, Campbell v. United States, 113 U.S. App. D.C. 260, 307 F.2d 597 (1962).

An increasingly troublesome problem facing this and other courts is the relationship between alcoholism and criminal responsibility. The long established doctrine is that voluntary intoxication is not a defense to criminal responsibility.[15/] However, in recent years, courts have been faced with situations where alcoholism causes mental defects which, in turn, produce uncontrollable behavior. While the alcoholism, per se, does not cause the deviating behavior, it is a factor to be considered in investigating the dynamics of an individual's behavior.

Today, chronic alcoholism is considered a disease warranting medical treatment rather than criminal sanctions. Easter v. District of

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14/ 18 U.S.C. §4244 (Supp. 1951), now 24 D.C. Code 301, 1967.

15/ Powell v. Texas, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed. 2d 1254 (1968); Salzman v. United States, 405 F.2d 358 (U.S. App. D.C. 1968).

Columbia, 124 U.S. App. D.C. 33, 361 F.2d 50 (1966). Consequently, the courts are beginning to recognize that excessive use of alcohol can have an affect on behavior and criminal responsibility. In Parker v. State, 4 Md. App. 62, 66, 241 A.2d 185, 188 (1968), the Maryland Court of Appeals recognized this principle.

> ". . .[B]ecause of defendant's acute brain syndrome, brought on by ingestion of alcohol over long periods of time, his judgment and comprehension at the time of the crime were impaired to the extent that he did not know what he was doing, or the nature and consequences of his acts."

In People v. Asher, 78 Cal. Rptr. 885 (1969) during a holdup of a bar, one of the accused shot a customer. At the trial, the court allowed the examining psychiatrist to testify that the accused was suffering from a mental defect exaggerated by alcohol. The court instructed the jury that if it found that the killing arose solely as a product of defendant's mental illness and intoxication, it was not in furtherance of a robbery, and the felony-murder rule would not be applicable.

In several cases, psychiatrists have testified to the affect of alcohol on behavior:

> ". . .when intoxicated her [appellant] aggression is liberated and violent acts may occur such as the stabbing of her brother. Along with this, her lowered intellectual quotient causes her to display very poor judgment and not to consider alternative ways of dealing with situations." King v. United States, 125 U.S. App. D.C. 318, 333, 372 F.2d 383, 398 (1967).

> "In my opinion, the combination of these two, the personality disorder plus in combination with acute alcoholism, could certainly impair his sensual modalities sufficiently that he might have periods where he would not understand or comprehend, not only what was going on about him, but really what he was doing, himself." Janovic v. Eyman, 406 F.2d 314, 316 (C.C.A. 9th, 1969).

> "However, he [Hawkins] is suffering from a 'low grade' mental illness, a Schizoid Character Disorder. This predisposes him to becoming psychotic, particularly under the influence of large amounts of alcohol. During these psychotic episodes, he would not be responsible for his actions." Hawkins v. United States, 114 U.S. App. D.C. 44, 45, 310 F.2d 849, 850 (1962).

One outward manifestation of a diseased mind, whether resulting from alcohol or drugs, is the appearance of an acute brain syndrome. In Hansford v. United States, 124 U.S. App. D.C. 387, 389, 365 F.2d 920, 922 (1966), the syndrome was defined as follows:

> "'. . .a basic mental condition characteristic of diffuse impairment of brain tissue function.' The characteristic symptoms of the syndrome are impairment of orientation; impairment of memory; impairment of all intellectual functions including comprehension, calculations, knowledge and learning; impairment of judgment; and liability and shallowness of affect. [The testifying psychiatrist noted that] 'although there was a general degree of orientation . . . where you have to use some type of memory recall in addition to some degree of orientation, the patient was grossly impaired.'"

In order to determine whether an accused is suffering from this mental condition at the time of the commission of an offense, a thorough mental examination is necessary. ". . .[T]he symptoms and effects of an acute brain syndrome produced by narcotics will often not be apparent to a lay observer, even a judge, but only to an expert. Even then a careful examination would seem necessary to determine the extent to which the defendant's memory and other rational faculties have been impaired by the drugs." (Emphasis added) Hansford v. United States, supra at 391, 365 F.2d at 924.

It is submitted that the undisputed evidence of record was sufficient to raise a serious question whether the chronic alcoholism of Thornton could have had an affect on his mental capacity at the time of the commission of the alleged offense. Such a determination cannot be made by the court without expert assistance. The failure of the lower court, sua sponte, to order a complete mental examination was clearly error and deprived Appellant of his right to a full and fair trial guaranteed by the Fifth Amendment.

E. The Withholding of Evidence Affecting The Credibility of A Witness Denied Appellant Due Process of Law Guaranteed By The Fifth Amendment.

Of more than routine note is the role Erskine Pittman played as a witness on behalf of the Government. Until he came forward eighteen months after the commission of the crime, the police had no idea (D.C. Tr. 255) who murdered Mrs. Mosby. However, with the information tendered by Pittman, the police apparently felt that the case was solved. Based on Pittman's information, the police secured Thornton's picture, along with five others and took them to Mosby's Jewelry Store (D.C. Tr. 51). There, in the presence of two police officers, Miss Sadie Luber allegedly selected Appellant's photograph out of the group (D.C. Tr. 51, 343). Relying on this identification and the information supplied by Pittman, a warrant for Thornton's arrest was prepared on November 20, 1968 (D.C. Tr. 344, 348).

On January 2, 1969, Pittman came forward again. At this date, he informed the police that his uncle would be visiting him that night (D.C. Tr. 344). Acting on the tip, the police set up a stakeout of

Pittman's apartment (D.C. Tr. 350). When Thornton arrived later that evening, he was arrested (D.C. Tr. 351).

During the Grand Jury proceeding, Mr. Pittman's November 19, 1968, statement to the police was read. At that time, he confirmed its validity (D.C. Tr. 329).[16/] Relying on this statement and the testimony of two other persons, a five count indictment against Thornton was returned. During the trial, information that Appellant felt he was "home free" (D.C. Tr. 296) and that he had killed Mrs. Mosby (D.C. Tr. 279, 295) reached the jury through the testimony of Mr. Pittman. In fact, it was Pittman who supplied all the details, from the inception of the robbery (D.C. Tr. 265, 266) to the confession of the shooting (D.C. Tr. 262-325; 332).

In view of this testimony, all the facts bearing on Pittman's credibility, his possible intentions, and his motives in acting as an informer and in testifying should have been made known to the jury. It is only through the full disclosure of all information that the jury can properly weigh a witness' credibility. For this reason, the jury was informed that Pittman admitted being a perjurer (D.C. Tr. 301, 302, 309, 310, 330). It was also clearly shown that he was the informer who supplied the police with information leading to Thornton's arrest (D.C. Tr. 255).

Another factor bearing on his credibility can only be inferred. Nonetheless, it cannot be ignored. In essence, Pittman testified he did

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16/ Three weeks before trial, Pittman admitted that this statement was a prevarication (D.C. Tr. 301, 309-311).

not know why he finally came forth and gave a statement (D.C. Tr. 307). Later on he reiterated that he did not know why he turned in his uncle (D.C. Tr. 324). However, some light was made available about his motive. When queried whether he hoped to make money by turning in his uncle, he replied affirmatively (D.C. Tr. 324). The next day he denied making this statement (D.C. Tr. 330, 331) but the record indicated otherwise (D.C. Tr. 330, 331). Under further examination, Pittman admitted knowing of a $500.00 reward for information leading to the arrest and conviction of Mrs. Mosby's murderer (D.C. Tr. 324, 330, 331).

The judge's charge competently and thoroughly advised the jury to receive the testimony of a perjurer (D.C. Tr. 491) and an informer (D.C. Tr. 490) with care and caution and to appraise the testimony of anyone having a possible interest, motive, or bias, with greater care than the testimony of an ordinary witness (D.C. Tr. 487-493).

In spite of the information made available, it appears that the Government did not reveal <u>all</u> it knew about Pittman. From the record, there were several obvious indications that Pittman was not just an interested third party seeking a reward, but was an active participant in the crimes committed. He introduced Thornton to Hubbard (D.C. Tr. 268, 365, 366). He conferred with his uncle at least three times before June 22, 1967, and at each time, the subject of robbing Mosby's Jewelry Store came up for discussion (D.C. Tr. 265-267, 272-273). Although he denied knowing where Hubbard was going after leaving the hotel the second time, he happened to meet him two or three minutes later (D.C. Tr. 293). After then leaving Hubbard, there was testimony that Pittman went to see what

happened at Mosby's (D.C. Tr. 293). Again, he denied knowing of Hubbard's whereabouts, but again he just happened to meet Hubbard in an alley a few minutes afterwards (D.C. Tr. 293-294). The coincidences did not cease there. The "chance" meeting of Hubbard, Thornton and Pittman the day of the crime was within fifteen minutes after its commission. His remaining (D.C. Tr. 278) in room 201 at the Dunbar Hotel until Hubbard and Thornton returned (D.C. Tr. 317) as well as their meeting the night before the crime (D.C. Tr. 269-270, 317) were more than coincidences.

Government witness William Hubbard pointed the most damaging finger at Pittman. He related that Thornton and he met Pittman somewhere the day of the crime (D.C. Tr. 369). After the aborted robbery, Hubbard and Appellant returned to the Dunbar Hotel where Pittman had a change of clothes ready (D.C. Tr. 372). Contrary to Pittman's statement that no plans were made to rendezvous (D.C. Tr. 292), Hubbard revealed that all three decided on the pool room as a meeting place (D.C. Tr. 373, 394) which is exactly where Pittman headed after leaving the Dunbar Hotel (D.C. Tr. 292). Hubbard also testified that Pittman knew all about the robbery and even asked him what had happened at Mosby's (D.C. Tr. 393). This was again directly contrary to Pittman's denial that he knew Hubbard was going to pull a "stick-up" (D.C. Tr. 319).

If the Government felt Pittman was involved in the crime as a principal or accessory, it kept this information to itself. Before Pittman was called as a witness, the defense attorney expressed his understanding that Pittman was being investigated for complicity in the offense then before the court (D.C. Tr. 262, 263). There was no explanation of this

fact by the prosecution (D.C. Tr. 262-263). When defense attorney suggested that Pittman did not want to get involved as a defendant, the prosecution failed to deny or affirm this possibility (D.C. Tr. 303). During cross-examination, the defense counsel renewed his attempt to implicate the witness (D.C. Tr. 314). Pittman reiterated that his fear of becoming involved was as a witness (D.C. Tr. 314), and again the Government failed to affirm or deny this statement. Later when defense attorney was trying to reveal Pittman's involvement, the Court admonished him with a reminder that Pittman was not on trial (D.C. Tr. 320). As before, the Government failed to reveal any information showing its belief that Pittman was involved. Finally, when defense counsel was trying to establish that Pittman was involved as an aidor and abettor, the Court cut him short (D.C. Tr. 322). Once more, the Government remained quiet about what it knew of Pittman's involvement.

It is submitted that, if the jury had known that the Government felt that Pittman was involved, it would have afforded his testimony less weight. Therefore, the Government was under an affirmative duty to reveal its suspicions, admit that an investigation was being conducted and disclose the facts developed in an open and frank manner. Instead, in its closing rebuttal summary, the Government almost inferentially revealed that Pittman was in fact under investigation for participation in the crimes. 17/

17/ In his closing rebuttal summary, co-counsel for the Government stated:

> "Now, we are the first to say to you, Mr. Green and I are the first to say to you, that we make no apologies for Mr. Pittman. There is no evidence at all before you that the investigation of Mr. Pittman is not continuing at this stage. There is no evidence before you to indicate that the investigation of Mr. Pittman has been closed." (D.C. Tr. 467).

But no facts were revealed. A clear and unambiguous admission by the Government might have caused the jury to completely discredit the testimony of Pittman. Although the jury knew that he was a perjurer and an informer, this does not relieve the Government of its obligation. In Napue v. Illinois, 360 U.S. 264, 270, 79 S.Ct. 1173, 1177, 13 L.Ed.2d 1217, 1221 (1959), the Supreme Court stated: ". . .[W]e do not believe that the fact that the jury was apprised of other grounds for believing that the witness Hamer may have had an interest in testifying against petitioner turned what was otherwise a tainted trial into a fair one." It is submitted, therefore, this suppression of evidence, which would have affected the credibility of the witness Pittman, clearly taints the whole proceeding.

The rationale for this principle has developed steadily over the years. It is now well established that a conviction obtained through use of false evidence, known to be such by representatives of the Government, violates due process.[18/] The same error results when the prosecution, although not soliciting false information, allows it to go uncorrected when it appears.[19/] Originally, courts found a violation of due process only

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17/ (Continued) It is submitted that this statement coming when it did, i.e., at the end of a long proceeding and hidden in the middle of closing rebuttal summary, and without further clarification, cannot cure the failure of the Government to have fully advised the Court and the defense counsel concerning this matter early in the proceeding.

18/ See, e.g., Napue v. Illinois, supra; Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942); and Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935).

19/ See, e.g., Alcorta v. Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957); United States ex. rel. Thompson v. Dye, 221 F.2d 763 (C.C.A. 3d, 1955); United States ex. rel. Almeida v. Baldi, 195 F.2d 815 (C.C.A. 3d, 1952).

when the suppressed or perjured information had a bearing on the accused's conviction. However, it was soon recognized that:

> "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guild. A lie is a lie, no matter what its subject, and, if it is any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . .That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did a trial that could in any real sense be termed fair." 20/

A distinction was also made between false testimony knowingly secured and misrepresentations and nondisclosure. Only the former was considered so heinous as to amount to a denial of a fair trial. However, this difference was eliminated in Brady v. Maryland, 373 U.S. 83, 87, 88, 83 S.Ct. 1194, 1197, 1198, 10 L.Ed.2d 215, 218, 219 (1963):

> "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. . . . A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not the result of guile'. . . ."

Focusing on the word "demand", Justice Fortas cogently surmised that there is ". . .no reason to make the result turn on the adventitious circumstance of a request. If the defense does not know of the existence

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20/ Napue v. Illinois, supra at 269, 79 S.Ct. at 1176, 13 L.Ed.2d at 1220, quoting People v. Savvides, 1 N.Y.2d 554, 557, 154 N.Y.S.2d 885, 887, 136 N.E.2d 853-855.

of the evidence, it may not be able to request its production. A murder trial - indeed any criminal proceeding - is not a sporting event."[21/]

Today, it is clear that there is an affirmative duty upon the prosecution to supply the court and the defense all information which is material, generously conceived, to the case, even if it bears only on credibility. If the Government had openly and fully apprised the court and the defense counsel of this investigation, its basis and its findings, this would have affected Pittman's credibility. Since the Government failed to fully disclose all that it knew of the witness, it is submitted that the Appellant was denied a fair trial in violation of the due process provision of the Fifth Amendment.

IV

CONCLUSION

It is respectfully submitted that the errors which occurred in the trial below can only be cured by a reversal and remand for a new trial. In addition, it is urged that the lower court be ordered: (1) To afford Thornton a complete mental examination to determine his competency both at the time of the commission of the alleged offense and at the time of trial; (2) to order the Government to fully disclose to the defense the

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21/ Giles v. Maryland, 386 U.S. 66, 102, 103, 87 S.Ct. 793, 816, 817, 17 L.Ed.2d 737, 760, 761 (1967). (Addendum to Concurring opinion of Justice Fortas).

results of its investigation of the witness, Erskine Pittman; and (3) such other relief as to the Court seems just and proper.

Respectfully submitted,

/s/ Robert L. Heald

Robert L. Heald

/s/ Vincent J. Curtis, Jr.

Vincent J. Curtis, Jr.

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SEPTEMBER 1, 1970

CERTIFICATE OF SERVICE

I, Robert L. Heald, with the firm of Fletcher, Heald, Rowell, Kenehan & Hildreth, do hereby certify that copies of the foregoing "Brief For Appellant" were hand delivered this 1st day of September, 1970, to the following:

John A. Terry, Esquire
Office of the United States Attorney
United States Court House
Washington, D. C. 20001
Counsel for Appellee

/s/ Robert L. Heald

Robert L. Heald

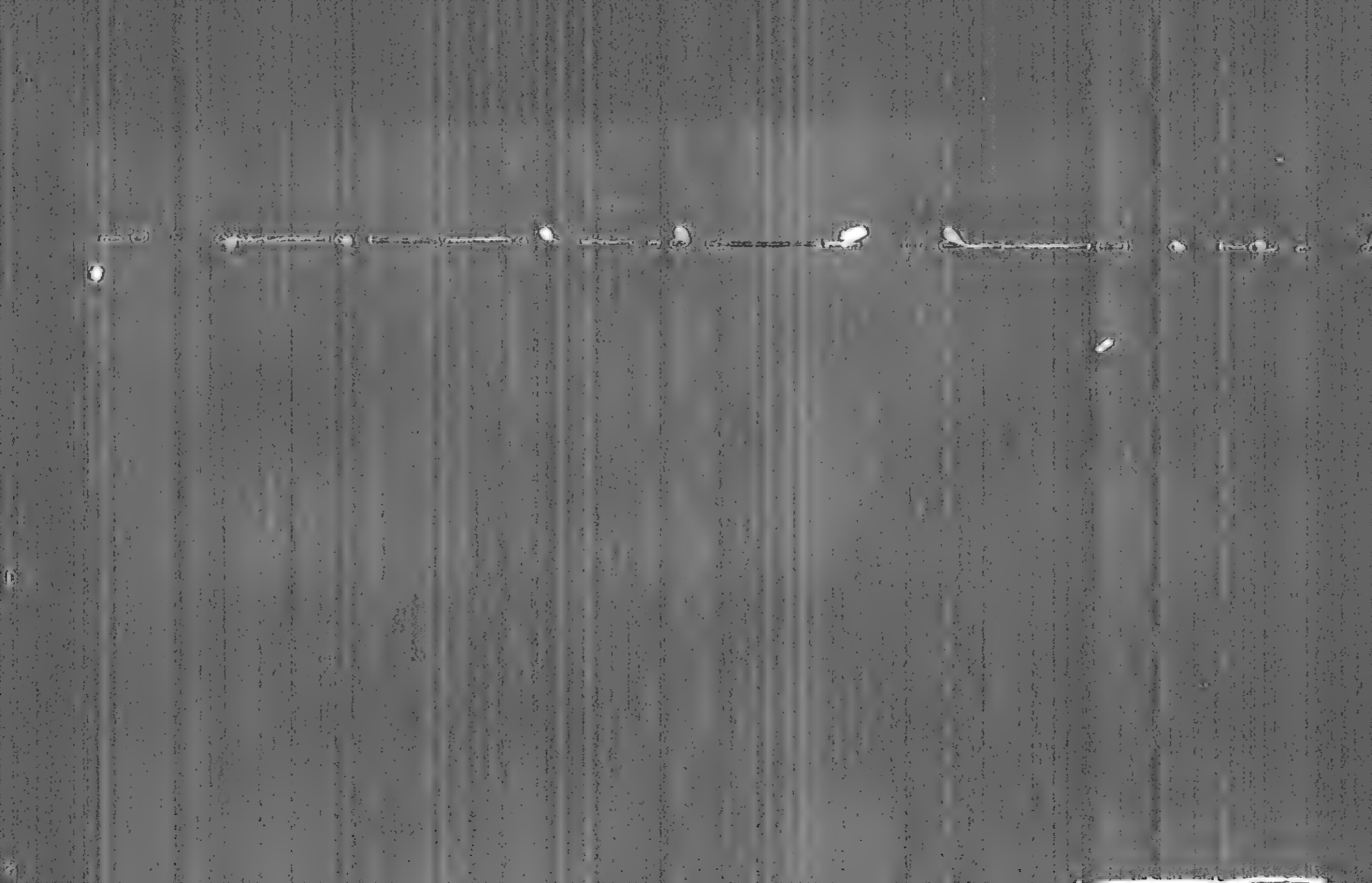

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TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee the following issues are presented:

1. Whether the pretrial photographic identification held in the absence of counsel violated appellant's Sixth Amendment rights?
2. Whether the trial court erred in admitting evidence of the pretrial photographic identification and the in-court identification of appellant made by Miss Luber?
3. Whether the trial court erred in its determination that appellant was competent to stand trial?
4. Whether the record reveals that the Government withheld pertinent impeachment evidence to which appellant was entitled?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,235

UNITED STATES OF AMERICA, APPELLEE

v.

FREDERICK THORNTON, JR., APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed April 2, 1969, appellant was charged in five counts with felony murder, second-degree murder, attempted robbery, assault with a dangerous weapon, and carrying a dangerous weapon (22 D.C. Code §§ 2401, 2403, 2902, 502, 3204). Trial commenced before the Honorable Edward M. Curran and a jury on April 2, 1970, and on April 9, 1970, appellant was found guilty of felony murder, attempted robbery, assault with a dangerous weapon and carrying a dangerous weapon.[1]

[1] The verdict of guilt rendered on the felony murder count obviated the necessity of a verdict on the second-degree murder count.

The jury thereafter returned a penalty verdict of life imprisonment, which sentence was imposed April 24, 1970. This appeal followed.

About 10:45 a.m. on June 22, 1967, two men entered Mosby's Jewelry Store at 1421 U Street, Northwest (Tr. 175-176). Mrs. Louise A. Mosby, the decedent, was standing behind a watch counter when one of the individuals, later identified as appellant, inquired about a Paul Bergette watch (Tr. 194, 196). Mr. John G. Mosby went to the rear of the store to help the other individual, later identified as William Hubbard, who stated he was with appellant (Tr. 177). Mrs. Mosby told appellant she had to obtain a battery for a watch, and, when she turned from him, he drew a gun (Tr. 194). Mrs. Mosby called to her husband, who saw appellant holding the gun. Just as she called, appellant shot her (Tr. 177-178). Mr. Mosby ducked behind a counter, and two more shots were fired (Tr. 178).

Miss Sadie Luber testified that she was seated in a chair in the store when the two individuals entered (Tr. 194). After the first shot was fired, she was able to see appellant's "side face," and when he turned to fire the other two rounds she saw "the full view of his face" (Tr. 195). She positively identified appellant as the murderer (Tr. 203). Miss Luber in November 1968 viewed six photographs exhibited by Lieutenant Chrispen F. Preston of the Homicide Squad and identified a photograph of appellant[2] (Tr. 48-49, 199-200). She further testified to her identification of the body of Mrs. Mosby at the morgue (Tr. 201).

Various police officers testified to the recovery of evidence and the preservation and processing of the scene

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[2] Appellant's trial counsel, not counsel on this appeal, made an oral motion for a pretrial suppression hearing to suppress any identifications made by Miss Luber. After a lengthy hearing (Tr. 5-57) the trial court excluded all testimony concerning the lineup identification, but permitted evidence of the photographic identification as well as Miss Luber's in-court identification of appellant (Tr. 62).

(Tr. 248-261). Sergeant William Mann of the Homicide Squad identified an expended bullet recovered from the scene and the bullet removed from the body of Mrs. Mosby at the autopsy[3] (Tr. 251, 256-257). He additionally related that on November 19, 1968, Erskin Pittman revealed appellant as the murderer (Tr. 255).

Erskin Pittman testified that appellant, his uncle, had discussed with him the possibility of robbing Mosby's Jewelry Store (Tr. 265-267). Prior to June 22, 1967, he introduced appellant to "Squeaky" Hubbard, and later appellant told him that they planned to rob Mosby's (Tr. 268, 273). On June 22, 1967, Pittman, Hubbard, James Andrews and appellant were in Andrews' room in the Dunbar Hotel. Hubbard and appellant left after speaking together in the bathroom (Tr. 275-277). About fifteen to twenty minutes later they returned to the room, out of breath and sweating; appellant related to Pittman that he had shot the lady behind the counter (Tr. 278-279). Appellant was carrying a silver gun on his return (Tr. 279). The following day appellant related to Pittman exactly what had occurred at Mosby's. He further revealed someone had been arrested for the offense and said that he was "home free" (Tr. 295-296). On cross-examination Pittman admitted that he lied in a statement he gave to the police and to the grand jury concerning his knowledge of appellant's involvement in the offense. He stated that he lied because he "didn't want to be involved" (Tr. 306, 309-311, 329).

James Andrews confirmed Pittman's testimony concerning the meeting in his room. He further confirmed that two men other than Pittman left the hotel room and returned shortly thereafter out of breath. One of the two men changed shirts in the bathroom after his return (Tr. 354-359). William Hubbard also testified on behalf of the Government. Hubbard stated that he was

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[3] A stipulation established that Dr. Linwood Rayford performed an autopsy on Mrs. Mosby on June 27, 1967. Testimony by Dr. Rayford established the cause of death of Mrs. Mosby as "hemorrhage and shock from a gunshot wound in the neck" (Tr. 149).

currently charged in a different indictment for the same offense. He related that he had consulted with his attorney, who was present throughout his testimony, and wished to testify (Tr. 362). He identified appellant (Tr. 364) and related the circumstances pertaining to the death of Mrs. Mosby (Tr. 364-376). Hubbard's testimony corroborated all the facts elicited earlier from other witnesses. On cross-examination Hubbard testified that he was to plead to a lesser offense for his part in the commission of the offense (Tr. 389).

The Government moved for the admission in evidence of its exhibits, and the motion was granted without objection (Tr. 405). Appellant's counsel moved for a judgment of acquittal on all counts. After argument, the motion was denied the following day (Tr. 418). Appellant called one witness, a Legal Aid investigator, and rested (Tr. 420-421). He requested the standard jury instructions (Tr. 422-423) and had his exhibits admitted into evidence (Tr. 424). Following arguments and instructions, the jury returned a verdict of guilty on all counts except the lesser included count of second-degree murder (Tr. 508). After additional instructions, the jury retired to consider the penalty and subsequently decreed life imprisonment (Tr. 513).

ARGUMENT

I. The pretrial photographic identification held in the absence of counsel did not violate appellant's Sixth Amendment rights.

(Tr. 3-59, 62-63)

Appellant urges that the absence of defense counsel at the photographic identification made by Miss Sadie Luber violated his Sixth Amendment right to counsel. To support this contention, he relies principally upon cases dealing with the issue of the right to counsel at lineups and cases in which photographic identifications made in the absence of counsel, if meeting the tests of fairness, were permitted. The weight of authority is heavily against him.

In *United States* v. *Kirby*, —— U.S. App. D.C. ——, 427 F.2d 610 (1970), this Court declined to hold that an accused had an absolute right to counsel at a pretrial photographic identification. Implicit in *Kirby* is the affirmative proposition that there is no such right.[4] Five other circuits have explicity and unequivocally so held.[5] As this Court indicated in *Kirby*, preservation of the photographs for judicial inspection[6] is sufficient to protest the rights of an accused, and abuses, if and when they occur, may be remedied by application of the exclusionary rule of *Stovall* v. *Denno*, 388 U.S. 293 (1967). Thus there is no occasion to expand the coverage of *United States* v. *Wade*, 388 U.S. 218 (1967) to photographic identifications.[7]

Accordingly the Government submits that the pretrial photographic identification held in the absence of counsel did not violate appellant's Sixth Amendment rights.

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[4] *See also United States* v. *Hamilton*, 137 U.S. App. D.C. 89, 420 F.2d 1292 (1969), in which the briefs show that the photographic identification complained of took place after the arrest of the defendant.

[5] *United States* v. *Ballard*, 423 F.2d 127 (5th Cir. 1970); *United States* v. *Sartain*, 422 F.2d 387 (9th Cir. 1970); *United States* v. *Collins*, 416 F.2d 696 (4th Cir. 1969), *cert. denied*, 396 U.S. 1025 (1970); *Reich* v. *United States*, 410 F.2d 1131 (10th Cir.), *cert. denied*, 396 U.S. 970 (1969); *United States* v. *Bennett*, 409 F.2d 888 (2d Cir.), *cert. denied*, 396 U.S. 852 (1969). The law in the Third Circuit appears to be unsettled. *Compare United States* v. *Conway*, 415 F.2d 158 (3d Cir. 1969), *with United States* v. *Zeiler*, 427 F.2d 1305 (3d Cir. 1970).

[6] The photographs exhibited to Miss Luber were available at the pretrial suppression hearing (Tr. 44).

[7] Unlike appellant, we do not include Nevada among those jurisdictions which have adopted a *per se* exclusionary rule based on *Wade*. *Compare Thompson* v. *State*, 85 Nev. 134, 451 P.2d 704, *cert. denied*, 396 U.S. 893 (1969), *with Carmichael* v. *State*, —— Nev. ——, 467 P.2d 108 (1969).

II. The trial court did not err in admitting Miss Luber's photographic identification and the in-court identification of appellant.

(Tr. 3-59, 62-63, 190-248)

An extensive pretrial hearing was held to determine the admissibility of Miss Luber's photographic, lineup and in-court identifications of appellant (Tr. 3-59). The trial judge excluded her lineup identifications [8] but ruled that she could identify appellant in court and testify to the photographic identification (Tr. 62-63). Appellant argues that this evidence was inadmissible as well. He bases his argument primarily on inconsistencies in statements given by Miss Luber to the Metropolitan Police on June 22, 1967, at the preliminary hearing on January 23, 1969, to appellant's trial counsel about "two or three weeks" before trial (Tr. 24), the pretrial hearing and at trial. Appellant additionally relies on the span of time available at the commission of the offense for an adequate observation, the age and condition of the witness, the lighting conditions, and the fact of emotional shock or trauma at witnessing the shooting of an old friend. Appellant's argument is in two parts. He contends first, that the pretrial photographic identification was unduly suggestive, and second, that the in-court identification based on the unduly suggestive use of photographs had no independent source.

Appellant's contentions as to the pretrial identification are without merit. The identification procedure by which Miss Luber identified the photograph of appellant was not "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons* v. *United States*, 390 U.S. 377, 379-380 (1968); *Stovall* v. *Denno*, 388 U.S. 293, 301-302 (1967).

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[8] Testimony at the pretrial identification hearing (Tr. 56) established that Miss Luber observed a picture of appellant on a police officer's desk immediately before the lineup. There is no contention that this observation was anything other than inadvertent.

Appellant does not take issue with any particular facet of the photographic identification made by Miss Luber but rather relies on a "totality of the circumstances" argument to assert that the "pretrial identification was too suggestive to permit its admission in evidence." [9] Miss Luber testified she saw "five or six" pictures in November 1968, some seventeen months after the shooting, and identified appellant (Tr. 21). Lieutenant Preston of the Metropolitan Police testified that on November 20, 1968, he showed six photographs to Miss Luber (Tr. 48-49). He testified that she looked at the pictures one at a time until she reached the fifth picture, that of appellant, whereupon she became visibly upset and stated, "My God, I will never forget him as long as I live. I told you when I saw his picture I would know him." (Tr. 50-51.)

Appellant argues, *inter alia*, that Miss Luber's statements which were used in extensive cross-examination for purposes of impeachment compel a finding of suggestiveness because of the discrepancies in the statements and other discrepancies elicited on examination. As previously noted, Miss Luber gave a number of statements during the pendency of this case. The record reflects that she never had an occasion to review her prior statements before testifying at the preliminary hearing, nor before she spoke with appellant's trial counsel some two or three weeks prior to trial (Tr. 247). It is only to be expected that skillful counsel was able to elicit a number of inconsistencies.[10] A similar argument, based principally on lapse of time, was recently raised in *United States* v. *McNair*, D.C. Cir. No. 22,372, decided April 8, 1970, where the photographic identification was made five months after the commission of the offenses and the in-court identification was made an additional six months later. This Court, in refusing to rule as a matter of law

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[9] Brief for appellant, pp. 6, 9.

[10] Vigorous cross-examination failed to diminish Miss Luber's positive identification. See *Simmons* v. *United States*, *supra*, 390 U.S. at 385.

that the time lapse vitiated the identifications, stated: "We think the accuracy of Silverman's identifications of appellant under the circumstances here was a question residing within the jury's province, and that the trial judge was entirely right in leaving it there." *McNair*, *supra*, slip op. at 5.

Appellant further contends that the number of pictures utilized, six, was insufficient to eliminate suggestiveness. Six photographs have been held sufficient, however, *United States* v. *Williams*, —— U.S. App. D.C. ——, 421 F.2d 1166 (1970).[11] Additionally, this Court has recently held that exhibiting only one picture is not necessarily so violative of due process that it necessitates reversal since "this fact must be viewed in conjunction with all the other circumstances in passing on the ultimate due process question." *Sutton* v. *United States*, D.C. Cir. No. 22,210 decided August 19, 1970, slip op. at 6. Having had an opportunity to evaluate the witness firsthand and having given careful consideration to the evidence, the trial judge ruled that the photographic identification of appellant by Miss Luber was not impermissibly suggestive. The Government submits that his ruling should be accepted by this Court unless clearly erroneous. *Cf. United States* v. *Kemper*, D.C. Cir. No. 22,558, decided July 10, 1970; *United States* v. *McNeil*, D.C. Cir. No. 22,360, decided October 31, 1969.

Although we maintain that the photographic identification was not impermissibly suggestive, even assuming *arguendo* that it was, the evidence is clear that Miss Luber's in-court identification of appellant was based on prior observations other than photographic. Admittedly the commission of the offense took place within a short span of time, but Miss Luber had both a side view and front view of the face of appellant (Tr. 12). While the store was not particularly bright in its illumination, the sun was shining through the front windows (Tr. 25).

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[11] In *Williams* the complainant identified both appellants' pictures from a single stack of six photographs.

She was never impeached concerning the height and build of appellant (Tr. 18), and she was close enough to appellant during the commission of the crime to overhear his conversation (Tr. 9). Additionally, she told the officer she would be able to recognize a picture of the murderer (Tr. 50-51), and she became quite upset when she observed appellant's picture (Tr. 200). The inference is apparent from the record that the trial court believed an independent source existed.[12] Appellant must shoulder a heavy burden to overcome this determination. *Cf. United States* v. *Long*, —— U.S. App. D.C. ——, 422 F.2d 712 (1970); *Clemons* v. *United States*, 133 U.S. App. D.C. 27, 408 F.2d 1230 (1968) (*en banc*), *cert denied*, 394 U.S. 964 (1969).

Further, appellant's contentions concerning the photographic identification and the in-court identification must be considered in light of the evil which the exclusionary rule is intended to prevent. The principal dangers attendant to a photographic identification are an incorrect identification, *i.e.*, irreparable misidentification, and a suggestion of a particular individual's guilt which leads to an identification when one cannot actually be made. *Simmons, supra.* The case at bar was by no means a case where proof of appellant's identification rested wholly on Miss Luber's testimony. Because of the overwhelming strength of the case against appellant based on other eyewitness testimony and circumstantial evidence, even if this Court should agree with appellant concerning Miss Luber's identifications, any error which resulted was unquestionably harmless beyond a reasonable doubt. *Harrington* v. *California*, 395 U.S. 250 (1969); *Solomon* v. *United States*, 133 U.S. App. D.C. 103, 408 F.2d 1306 (1969).

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[12] It does not appear that the trial court expressly ruled that there was an independent source for Miss Luber's in-court identification (Tr. 62-63).

III. The trial court's determination of competency to stand trial was proper.

(Tr. 62-76, 146)

While the record is barren of any specific request, either written or oral, for a competency examination, it appears that on April 1, 1970, when the instant case was called for trial, appellant requested for the first time that he be examined to determine his competency to stand trial. The request, apparently made in chambers, was not coupled with any particular factual basis (Tr. 62, 75); rather, appellant's counsel maintained at the time that he saw "nothing wrong with this man [appellant]," and he found "him to be completely rational and completely cooperative" (Tr. 76). The court appointed Dr. Edward C. Kirby, a psychiatrist with the Legal Psychiatric Service, to interview appellant. Dr. Kirby examined him in the cellblock April 2, 1970 (Tr. 66-A, 68). At the time of the examination Dr. Kirby had appellant's medical record from Area C of the Community Mental Health Center which he reviewed prior to his interview (Tr. 69). After his examination, Dr. Kirby testified at the hearing that appellant was competent to stand trial (Tr. 68). Appellant now argues that the determination of competency made solely on the basis of Dr. Kirby's testimony was erroneous and constitutes reversible error. We respectfully disagree.

The test of competency to stand trial was set forth by the Supreme Court in *Dusky* v. *United States*, 362 U.S. 402 (1960):

> [T]he test must be whether [the accused] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as a factual understanding of the proceedings against him.

The mere fact that there may be something mentally wrong with a defendant, or that he may be emotionally unstable, does not necessarily render him mentally incompetent to stand trial. *Lebron* v. *United States*, 97

U.S. App. D.C. 133, 229 F.2d 16 (1955), *cert. denied*, 351 U.S. 947 (1956). Appellant does not principally attack the determination of competency, which clearly was compelled by the evidence, but argues that the scope of the examination was so limited that he was denied an adequate basis upon which a finding could be made.

As previously noted, there is nothing to indicate that the competency of the appellant was in issue prior to the trial date. The trial court, faced with the prospect of continuing the case on the day of trial, resorted to a cellblock examination by a psychiatrist from Legal Psychiatric Service. Such a procedure comports with this Court's view expressed in *Pouncey* v. *United States*, 121 U.S. App. D.C. 264, 266 n.4, 349 F.2d 699, 701 n.4 (1955), where it was established that a competency examination could be conducted "without serious delay or prejudice, *e.g.*, by recessing the trial overnight and asking the Hospital or the Legal Psychiatric Service for a prompt report."

Appellant argues, however, that even if a cellblock examination is sufficient with respect to its situs, as a matter of law he should have been accorded an exhaustive mental examination which this Court in several cases has suggested would be appropriate when a determination of responsibility is requested. Appellant's reliance on those cases is inappropriate. For example, he cites *Rollerson* v. *United States*, 119 U.S. App. D.C. 400, 343 F.2d 269 (1964), in support of his proposition of an extensive examination. It is clear, however, that *Rollerson* is inapposite, not only since it applies to an examination for responsibility but additionally since it supports such an examination for the possible development of an insanity defense which appellant specifically disclaimed (Tr. 146). *Cf. Trest* v. *United States*, 122 U.S. App. D.C. 11, 350 F.2d 794 (1965), *cert. denied*, 382 U.S. 1018 (1966). Thus, while an extended examination is most beneficial when warranted by the circumstances, an examination for competency "require[s] less than examinations designed to determine sanity for the pur-

pose of criminal responsibility." *Blunt* v. *United States*, 100 U.S. App. D.C. 266, 275 n.23, 244 F.2d 355, 364 n.23 (1957). *Blunt*, therefore would appear dispositive of appellant's contention.

Appellant, citing matters not of record,[13] additionally claims that a protracted examination would have discovered, *inter alia*, "the mental problems afflicting other members of the Appellant's family, thereby suggesting a congenital mental defect," as well as appellant's "long history of alcoholism and anti-social behavior," [14] matters which could have been adduced by his testimony at the competency hearing. Appellant, however, chose not to testify or produce testimony from any members of his family. Contrary to his position on appeal, the record contains material supporting competency both at the time of trial and prior thereto. On July 28, 1969, appellant in a written communication to the court expressed dissatisfaction with his attorney. This letter, contained in the record, resulted in the replacement of counsel. It further indicated that he was fully apprised of his circumstances and the nature of the case against him.

Additionally, the record reflects that on February 11, 1970, appellant filed a *pro se* motion for dismissal of the indictment on the ground that he had been denied a speedy trial. In his motion he displayed an understanding of the case against him and the proceedings necessary to secure judicial review of his alleged plight. Finally, we note again the representations of trial counsel concerning his lack of difficulty in communicating with ap-

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[13] *See Johnson* v. *United States*, D.C. Cir. No. 21,851, decided June 20, 1969, slip op. at 9-10, *reaffirmed en banc*, —— U.S. App. D.C. ——, —— n.8, 426 F.2d 651, 656 n.8 (1970); *Suggs* v. *United States*, 132 U.S. App. D.C. 337, 341 n.5, 407 F.2d 1272, 1276 n.5 (1969); ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *The Defense Function* § 8.4(c), and commentary on that section at 304-305 (Tent. Draft 1970).

[14] Brief for Appellant, p. 14. The latter representation apparently arises from the criminal record of appellant which he alternately claims was available at trial (Brief for Appellant, p. 15 n.10) and was not available (Brief for Appellant, p. 10 n.5).

pellant and his belief that no problems existed with reference to the mental capacity of appellant (Tr. 76). The record clearly supports the determination of competency made by the trial court.

In conclusion we submit that the competency hearing was "an informed one," *Holloway* v. *United States*, 119 U.S. App. D.C. 396, 398, 343 F.2d 265, 267 (1964), which complied with the applicable standards, *i.e.*, "the inquiry must be of record and both parties must be given the opportunity to examine all witnesses who testify or report on the accused's competence." *Blunt* v. *United States*, 123 U.S. App. D.C. 375, 377, 389 F.2d 545, 547 (1967), citing *Hansford* v. *United States*, 124 U.S. App. D.C. 387, 390 n.8, 365 F.2d 920, 923 n.8 (1966). Thus, where a fair and adequate hearing was held, deference should be given to the trial judge's determination. *Pouncey* v. *United States*, *supra*, 121 U.S. App. D.C. at 266, 349 F.2d at 701. This Court should grant neither a new trial nor the more appropriate relief, assuming an inadequacy of a *nunc pro tunc* determination. See *Heard* v. *United States*, 129 U.S. App. D.C. 100, 390 F.2d 866 (1968). The record presents no evidence that the determination of the trial court was other than correct.[15]

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[15] Appellant additionally argues that the trial court erred by failing to order an examination to determine his mental condition at the time of the commission of the offense. This contention is raised for the first time on this appeal. As we mentioned previously, no indication existed prior to trial that appellant was other than mentally sound both at the time of trial and at the time of the commission of the offense. Appellant chiefly relies on a report which the examining psychiatrist utilized in determining the competency of appellant to raise the issue of possible brain damage through excessive alcohol consumption. The record, however, fails to sustain appellant's position.

This Court's recent decision of *United States* v. *Collins*, D.C. Cir. No. 22,550, decided August 28, 1970, appears dispositive of his argument. Unlike the situation in the case at bar, in *Collins* a timely, written motion was filed for a mental examination. In her motion counsel indicated that her client was a drug addict, that his drug addiction was direct result of a mental disability, and that she experienced difficulty in communicating with her client and gaining his cooperation. The defendant actively opposed her motion both orally and by letter to the court. This Court, in sus-

IV. The record fails to support appellant's contention that the Government withheld pertinent evidence, thereby depriving appellant of due process of law.

(Tr. 255, 262-299, 306-307, 309-310, 320-324, 329-330)

Erskin Pittman, a nephew of appellant, informed the police in November 1968 of appellant's involvement in the crime occurring June 22, 1967, at Mosby's Jewelry Store (Tr. 265, 298-299). It was this information which began a chain of events culminating in appellant's trial (Tr. 255). Pittman gave both the police and the grand jury a statement which he admitted at trial was a lie (Tr. 309, 329). That statement alleged that Pittman was an innocent bystander who observed appellant and another man leave Mosby's. At trial on direct examination Pittman admitted that he knew of appellant's plans to rob Mosby's Jewelry Store and further admitted that he was with appellant both before and after the commission of the offense. He further testified that he knew about the shooting (Tr. 263-298).

Appellant maintains that the Government was suspicious of Pittman because they believed he was subject to criminal prosecution for his involvement in the crime for which appellant was on trial. Appellant then argues that since the prosecutor never explicitly announced this belief to the jury, with the exception of a reference in his closing statement, and never revealed to the court or defense counsel the basis of such belief, nor the Government's findings and conclusions, if any, regarding Pittman's possible involvement, appellant was denied material for impeachment which would have totally discredited

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taining the trial court's denial of the motion, stated that the law is not "that evidence of addiction alone invariably requires a commitment under 24 D.C. Code § 301." *Collins, supra*, slip op. at 9. Analogously, evidence of alcoholism should not in and of itself require a mental examination pertaining to the time of the commission of the offense, particularly in the absence of a request for any such examination, where it is obvious that able trial counsel has not chosen to rely on a defense of insanity (Tr. 146).

the testimony of Pittman. The record does not support appellant's contention.

Prior to Pittman's testimony, appellant's trial counsel approached the bench and told the court that he understood that Pittman was "presently being investigated for complicity in this case" (Tr. 262). This information, which could only have been provided by the prosecution, inicated an awareness of any Government suspicions. During the direct examination of Pittman, the prosecutor provided appellant with a copy of his initial report to the police in which he alleged he was standing outside Mosby's when the offense was committed (Tr. 299). This report was also contained in summarized form in the affidavit attached to the arrest warrant. Appellant also possessed a copy of the grand jury minutes which contained the same statement (Tr. 329). During cross-examination Pittman was branded a perjurer and a liar (Tr. 306, 309-310, 320, 329-330), an informer (Tr. 307), a man seeking gain by informing on his relatives (Tr. 324) and a criminal (Tr. 321-322). It was further implied that Pittman's testimony was given in response to the Government's promise not to seek his prosecution (Tr. 321). Finally, as appellant concedes, the trial court "competently and thoroughly advised the jury to receive the testimony of a perjurer and an informer with care and caution" (Brief for Appellant, p. 22). Appellant's grave allegation that the Government used "false evidence" and allowed it "to go uncorrected" (Brief for Appellant, p. 25) is clearly not supported by the record.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CASE NO. 24,235

UNITED STATES OF AMERICA, Appellee,

V.

FREDERICK THORNTON, JR., Appellant.

Appeal From the United States
District Court For The District of Columbia

REPLY BRIEF FOR APPELLANT

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OCTOBER 30, 1970

United States Court of Appeals
for the District of Columbia Circuit

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IN THE UNITED STATES COURT OF APPEALS
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CASE NO. 24,235

UNITED STATES OF AMERICA, Appellee,

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FREDERICK THORNTON, JR., Appellant.

REPLY BRIEF FOR APPELLANT

ARGUMENT

A. The Absence Of Counsel At A Pretrial Photographic Identification Was A Denial Of Appellant's Right To the Assistance of Counsel Guaranteed By The Sixth Amendment.

The Government suggests that this Circuit has recently disposed of the right to assistance of counsel at pretrial photographic identification. In its brief (Brief for Appellee, p. 5), the Government cited Unites States v. Kirby, _____ U. S. App. D. C. _____, 427 F. 2d 610 (1970), for the proposition that an accused has no absolute right to counsel at pretrial identification sessions. This reading of Kirby by the Government is too restrictive. Quite to the contrary, this Court in Kirby, citing Thompson v. State, 451 P. 2d 704, cert. denied, 396 U. S. 893, 90 S. Ct. 189, 24 L. Ed. 2d 170 (1969), recognized

that the right to counsel exists but could be excused if adequate substitutes were employed.

A look at Kirby illustrates several significant distinctions from the case now before the Court. In Kirby the witness had an excellent opportunity to observe the robber for a full ten minutes - not a matter of seconds (Brief for Appellant, p. 7). Also, Kirby's identification was made within days of the offense - not seventeen months afterwards. Additionally, the identification in this case was conducted after the police felt that Thornton was the prime suspect and the officer wanted the identification for trail purposes. In Kirby the police did not have the benefit of an informer who had explicitly pointed out the defendant. Finally, in Kirby it can be assumed that a pressing need to obtain the defendant's identification existed, first because there was a probable chance of flight, and second, since the opportunity of apprehension was dependent on the proximity of the arrest to the offense. In Thornton's situation, seventeen months had passed, indicating that the police had no pressing need for an immediate identification. These distinctions vitiate the authority of Kirby as dispositive of the instant case.

In United States v. Gaines, D. C. Cir. No. 23,369, decided August 27, 1970, and consequently after Kirby, this Court acknowledged that Clemons v. United States, 133 U. S. App. D. C. 27, 408 F. 2d 1230 (1968) (en banc), cert. denied, 394 U. S. 964 (1969) and United States v. Hamilton, _____ U. S. App. D. C. _____, 420 F. 2d 1292 (1969), are still the controlling cases on pretrial photographic identifications in this Circuit. United States v. Gaines, supra at 5. In Clemons the Court held that:

> "Whenever the prosecution proposes to make eyewitness identification a part of its case, the defense is entitled to know, through disclosure by the prosecution or by evidentiary hearing outside the presence of the jury, the circumstances of any pretrial identification. If it is one where the court finds that the Sixth Amendment right to counsel existed but was not observed, the prosecution may not, under the per se exclusionary rule enunciated by the Supreme Court in Gilbert,[1] offer such identification as part of its case." Clemons v. United States, supra at 34, 408, F. 2d at 1237.

Clemons went on to hold that each case must be evaluated in light of the totality of the surrounding circumstances to discern whether the identification procedure was so unduly suggestive as to create a very substantial likelihood of irreparable misidentification. Id., at 47, 408 F. 2d at 1250.

United States v. Hamilton, supra, picked up the standard first enunciated in Simmons v. United States, 390 U. S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968). Looking at the totality of the surrounding circumstances, this Court there found that the pretrial photographic identification of Hamilton was not unduly suggestive. However, in passing the Court noted that, as in Simmons, the identification session was designed to narrow the field of suspects and, therefore, to have counsel present was an obvious impracticality. United States v. Hamilton, supra, at 1294, Note 4. The situation here is inapposite. The prosecutional process had focused on Thornton and at this stage, under the surrounding circumstances, he was entitled to the assistance of counsel in all identification confrontations. Cross-examination

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1/ Gilbert v. California, 388 U. S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 (1967)

and the availability of the photographs used were not adequate substitutes for the right to counsel at a time when the chance of irreparable misidentification was particularly grave. Cf. United States v. Wade, 388 U. S. 218, 229, 87 S. Ct. 1926, 1936, 18 L. Ed. 2d 1149, 1159, 1160 (1967). The absence of counsel was, therefore, a denial of Thornton's right to assistance of counsel.

B. The Admission Of The Pretrial Photographic Identification Under The Circumstances Of This Case, Constituted A Denial Of The Due Process Of Law Guaranteed By The Fifth Amendment.

Confronted with the problem of the admissibility of pretrial photographic identifications, the Supreme Court has definitively stated that each case must be determined on the totality of the surrounding circumstances. Simmons v. United States, supra. This procedure was carefully followed in United States v. Hamilton, supra. Adherence is equally applicable here.

Compliance with this mandate in the instant case reveals that the surrounding circumstances preclude the use of this pretrial identification. In comparison with United States v. McNair, D. C. Cir. No. 22,372, decided April 8, 1970, and relied on by the Government (Brief for Appellee, p. 7), Thornton was not identified until seventeen (17) months after the commission of the offense (Tr. 21) and another eighteen (18) months passed before the in-court identification was made.[2/] Additionally, both the Supreme Court and this Court have stressed in Simmons; Hamilton; Sutton v. United States, D. C. Cir. No. 22,210, decided August 19, 1970; and United States v. Kemper, D. C. Cir. No. 22,558, decided

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2/ November 1968, when the photographic identification was made to April 1970, when the trial was held.

July 10, 1970; cases relied upon by the Government, that the identifier had an excellent opportunity to observe the offender, a factor here lacking. Other extenuating factors,[3/] including the quantity of photographs utilized, have previously been elaborated upon (Brief for Appellant, pp. 6-8) to lend support to the proposition that the extra judicial photographic identification should have been prohibited for its lack of trustworthiness, i.e., its "very substantial likelihood of irreparable misidentification." Simmons v. United States, supra, at 379, 380, See, Stovall v. Denno, 388 U. S. 293, 301-302, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967).

Since the total fact situation indicates that the circumstances surrounding the perpetration of the crime did not lend themselves to an accurate identification of the gunman, to permit the admission of this pretrial photographic identification would be to render the admonition that "each case must be considered on its own facts" a nullity. Simmons v. United States, supra, at 384.

As to the independent origin of the in-court identification, the descriptive contradictions (Brief for Appellant, p. 8), both before and after the appointment of trial counsel (Tr. 202-207; 217-223), the frequent need for the witness to refresh her memory from past testimony (Tr. 17, 203, 206, 217, 218) and the age

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3/ The fact that the witness could hear the assailant does not mean Miss Luber had an excellent opportunity to see the gunman. Also, the fact that the witness was not impeached concerning the assailant's height and build is meaningless when compared with the numerous discrepancies found. These inconsistencies go far in diminishing Miss Luber's positive identification (See, Brief for Appellee, p. 9).

(Tr. 5) and health (Tr. 435) of Miss Luber speak for themselves in mitigating the possibility that this identification was independently derived.[4/]

Admission of Miss Luber's identification was far from harmless error. Of the two eyewitnesses, only she was able to identify Thornton (Tr. 180). Moreover, the other key Government witnesses had good reason to lie: Pittman for a possible promise of immunity (Tr. 321)[5/] and a $500.00 reward (Tr. 324); and Hubbard for the opportunity to plea to a lesser offense (Tr. 384). In light of all these factors, the identification by Miss Luber was particularly devastating to Mr. Thornton. Without her identification, the Government's case is a fortiori, reduced to the testimony of Pittman and Hubbard. It is only their testimony that places Thornton at Mosby's Jewelry Store that day of the crime.

4/ The Government suggests that Thornton must shoulder the burden of proof in overcoming the determination that Miss Luber's in-court identification was derived from an independent source. (Brief for Appellee, p. 9). However, there is much confusion as to the burden which the defendant must overcome. First, it is argued that there is only an inference that the court believed an independent source existed. Then it is admitted that the court below never addressed itself to the issue of independent origin. And finally, it is declared that the court had indeed made a determination which the Defendant must overcome. Query: How can a party overcome a determination which the court never expressly made.

5/ It is important to note that the Government in its Brief never denied that Pittman was under investigation reinforcing the contention that he was indeed under suspicion. See p. 13,14, infra.

C. The Court's Determination That Appellant Was Competent To Stand Trail Was Erroneous.

In the hearing below, a question was raised whether the examination conducted by Dr. Kirby was sufficient to determine Thornton's competency to stand trial (Tr. pp. 69-75). Because of the lack of adequate time, facilities and space to conduct the examination it is submitted that the trial court, in fact, could not make an informed determination of competency. Cf. Green v. United States, 123 U. S. App. D. C. 408, 389 F. 2d 949 (1967).

The Government's reliance upon Lebron v. United States, 94 U. S. App. D. C. 133, 229 F. 2d 16 (1955), cert. denied, 351 U. S. 974 (1956), is clearly misplaced. Initially, Lebron was decided before the Supreme Court's decision in Dusky v. United States, 362 U. S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960), and this Court's decisions in Green v. United States, supra, and Cannady v. United States, 122 U. S. App. D. C. 120, 351 F.2d 817 (1965). The clear and restrictive standards established by these later decisions as to the competency examination and competency conclusion go far beyond the standards governing at the time of Lebron.[6/] Furthermore, in Lebron, a team of three psychiatrists examined each of the defendants prior to trial and submitted detailed reports supporting the finding that the defendants were sane, thereby indicating an informed determination.

6/ It is respectfully submitted that the technical deficiency in the motion made by the defendant's counsel in Lebron and relied upon by that Court would not, under this Court's standards existing today, result in a common decision.

Although it is understandable that the trial Court wished to conduct the case without undue delay, it is important that the accused be afforded an adequate psychiatric examination. Cf., Mitchell v. United States, 114 U. S. App. D. C. 353, 316 F. 2d 354 (1963). In Pouncey v. United States, 121 U. S. App. D. C. 264, 349 F. 2d 699 (1965), there had already been an examination of the defendant at St. Elizabeth's where it was concluded that Pouncey was competent. Here, there was no such initial determination. The attempt by the Government to seek support in this Court's decision in Pouncey for the adequacy of the truncated cellblock examination in the case at bar must fail.[7/] This Court's language of a "prompt report" cannot in any way be construed as a relaxation of the precise standards required for the examination itself. See, Green v. United States, supra; Cannady v. United States, supra.

The need for a more detailed examination would have revealed material both in the record and presently outside the record that bears upon defendant's competency. However, because a quick perfunctory examination was held, the psychiatrist's report lacked information, for example, on the mental instability of the defendant's family and his long history of alcoholism and anti-social behavior,[8/] factors which should have been considered, inter alia. In addition,

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7/ In Pouncey, although the competency issue was not raised at trial, it was briefed at the direction of this Court on appeal. Despite the fact that the Appellant-Defendant had undergone a complete mental examination at St. Elizabeth's prior to trial, the Court remanded the proceeding.

8/ Whether the police record was available to the Court has no bearing on the information obtainable by the psychiatrist. In examining the defendant and preparing his report, the psychiatrist has the opportunity to look at material not part of the official record. Thus, even if the Court did not have Thornton's police record on hand, the examining psychiatrist should have had available this material which was a further indication of his incompetency and another factor to be considered in the examination and report.

the psychiatrist failed to utilize material on the record which bore on Thornton's competency.[9/] The Government stresses that Thornton's pro se motion for dismissal due to a lack of a speedy trial illustrated competency. A deeper look at this same motion accentuates the very need for more detailed information. Not only was he "mentally depressed" and "emotionally upset" but " . . . due to the passage of time, defendant is unable to set up proper defense to counteract the charges against him, because of the lost [sic] of memories over a period of thirty (30) odd months, when the alleged crime supposedly occurred."[10/] Here, Thornton put the Court on notice of his mental condition both at the time of the offense and two weeks before the trial commenced. A detailed examination would have cast some light on the validity of his claim, which was part of the record, but not used by the examining psychiatrist.[11/]

Thornton fully agrees with the Government that a competency hearing must be "an informed one" (Brief for Appellee, p. 13). However, the Government's reliance upon the quoted language from Blunt v. United States, 100 U. S. App. D. C. 266, 244 F. 2d 355 (1957) to support its conclusion that Blunt is dispositive of Thornton's contention (Brief for Appellee, pp. 12, 13) miscontrues the issue. Thornton has not argued that there is no difference between the examination required

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9/ The Government's contention that Thornton's motion for dismissal of counsel was prima facie proof of competence is inconclusive. In all likelihood, the letter was prepared by a fellow inmate, indicating the "jailhouse lawyer's" competency but having no bearing on that of defendant. See, Johnson v. Avery, 393 U. S. 483, 89 S. Ct. 747, 21 L. Ed. 2d 718 (1969).

10/ Defendant's pro se motion filed with the District Court, March 17, 1970, p. 2. See also, Pouncey v. United States, supra.

11/ Dr. Kirby availed himself of only the Area C Community Health Center record (Tr. 68, 69).

for criminal responsibility and that required for a competency examination.[12/] Rather, it has been his continued position that the examination conducted below failed to meet the existing standards established by this Court. Green, supra. Therefore, it is respectfully submitted that where the very basis of that hearing, i.e., the examination itself, is woefully inadequate, then not only is there no possibility of reaching an informed determination but, in addition, the hearing becomes an empty procedure.

D. The Court Erred in Failing To Order, Sua Sponte, an Examination To Determine Appellant's Mental Condition At The Time Of The Commission Of The Offense.

In its attempt to respond to the above issue, the Government has failed to come to direct grips with the question of the duty of a trial Court to order a mental examination, sua sponte, and its sole reliance upon United States v. Collins, D. C. Cir. No. 22550, decided August 28, 1970 (Slip Opinion) is totally inapposite.

In Collins before trial, defense counsel moved for a mental examination which was actively opposed by the defendant. At a hearing on the motion, the defendant continued his protest and " . . . the court interrogated appellant at length, probing his knowledge and understanding of the charges against him and his capacity and purpose to be of assistance in the preparation of his defense."

12/ This Court has, however, explained that the purposes of a mental examination to determine competency should be broad enough "to get evidence on whether, if there is a trial, the jury should be instructed on insanity and criminal responsibility." Mitchell v. United States, supra, at 359, 316 F. 2d at 360, quoted with approval in Canrady v. United States, supra, at 122, 351 F. 2d at 819.

United States v. Collins, supra at 3. Although the motion was denied, the Court, after pronouncing a verdict of guilty, nonetheless stated:

> " . . . that it 'will take upon itself that before sentence, whether this defendant wants to or not, he will have some psychiatric examination' . . . The Court then ordered appellant to St. Elizabeth's for a mental examination, and continued the sentencing proceeding." Id. at 4.

Following the receipt of the report from St. Elizabeth's, a hearing was held at which the issues of insanity and competency were explored in depth. Id. at 5

In approving the procedure, this Court stated that "The court here made a careful and detailed inquiry . . . and the responses to that inquiry are not such as to enter the ruling an abuse of discretion." Id. at 9. This Court, in a footnote, went on to add:

> "Because this case was tried by the court without a jury, it could be said that, for all practical purposes, appellant was given the chance to defend on the grounds of insanity when the court delayed sentencing until after appellant had been examined at St. Elizabeth's and an evidentiary hearing was held at the time of the motion for a new trial." Id. at n. 5, p. 10.

In the case now before the Court, Thornton has raised serious questions as to the affect of alcoholism on the individual's mental soundness, an issue which the Government has chosen to ignore. Nonetheless, it was brought to the Court's attention that Thornton had a problem of alcoholism (Tr. 72,73), that the alcoholism resulted in an abnormal mental condition (Tr. 72), that this condition affected his behavior (Tr. 72) and that he was probably drinking the morning of the offense (Tr. 369). This raised the inference that the mental defect existed at the time of the offense and the very offense was the product

of this defect. Disposition of this issue is necessary to assure that one not mentally sound is not held criminally responsible. To adduce this, the assistance of expert testimony is required.[13/] The means to obtain this assistance is to order a mental examination, sua sponte, when the inference of a lack of criminal responsibility manifests itself from the record.

In the case at hand, Thornton urges this Court to establish the requirement that when, during the course of a trial, factors are brought to the attention of the trial judge, which raise a question as to the mental responsibility of the defendant, the trial judge must, sua sponte, order a mental examination. In urging his argument, Thornton is well aware of the restriction established by 24 D. C. Code §301(j) which specifically places the burden of raising the defense of insanity upon the defendant. It is respectfully submitted, however, that Section 301(j) cannot be construed as preventing this Court from providing the vehicle upon which an informed decision to raise the defense may rest. See, e.g., United States v. Collins, supra.

13/ Cf. Carter v. United States, 102 U. S. App. D. C. 227, 232, 252 F. 2d 608, 617 (1957).

E. The Withholding of Evidence Affecting the Credibility Of A Witness Denied Appellant Due Process of Law Guaranteed By The Fifth Amendment.

Although Erskine Pittman was branded as a perjurer and informer, the jury,[14] as the ultimate weigher of credibility, was entitled and, in fact, required to be enlightened on all relevant motives bearing on a witness' testimony. Accordingly, a full disclosure, not substantial compliance, was required.[15] Information relating to Pittman's complicity in the crime before the Court, coming from the Government, would have been weighed by the jury in its determination of Pittman's truth and, therefore, should have beem made available to the jury.[16]

The Government erroneously contends that counsel for Thornton charged the Government with using "false evidence" and "allowed it to go uncorrected." (Brief for Appellee, p. 15). Nowhere in its brief was such a charge made. The Government apparently misread a statement of law promulgated by earlier cases which was cited simply as a basis for the contention advanced: That it was improper for the Government not to disclose information about its investigation of

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14/ As pointed out by the Government (Brief for Appellee, p. 15), Thornton's trial counsel was under the impression that Pittman was being investigated. However, there was never any affirmance of this belief nor was the jury informed of any investigation at this time (Tr. 262).

15/ Cf. Napue v. Illinois, 360 U. S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959).

16/ The burden of such disclosure to the jury is clearly upon the Government. See, Giles v. Maryland, 386 U. S. 66 87 S. Ct. 793, 17 L. Ed. 2d 737 (1967); Brady v. Maryland, 373 U. S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

Pittman. Diametrically opposed to this contention, Thornton argued that even the inadvertent withholding of evidence affecting the credibility of Government's witness denied Thornton a fair trial under the Fifth Amendment of the Constitution. In the proceedings below, the prosecution was remiss in exercising its affirmative duty to supply the Court and the defense with all information which is material, generously conceived, to the case, even if it bears only on credibility and this inadvertence denied Thornton a fair trial. 17/

17/ It is essential to note that the Government does not deny that at the time of this trial, Pittman was in fact under investigation for complicity in the crimes that Thornton was found guilty of below.

CONCLUSION

It is respectfully submitted that the errors which occurred in the trial below can only be cured by a reversal and remand for a new trial. In addition, it is urged that the lower court be ordered: (1) To afford Thornton a complete mental examination to determine his competency both at the time of the commission of the alleged offense and at the time of trial; (2) to order the Government to fully disclose to the defense the results of its investigation of the witness, Erskine Pittman; and (3) such other relief as to the Court seems just and proper.

Respectfully submitted,

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October 30, 1970

CERTIFICATE OF SERVICE

I, Robert L. Heald, with the firm of Fletcher, Heald, Rowell, Kenehan & Hildreth, do hereby certify that copies of the foregoing "Brief for Appellant" were hand delivered this 30th day of October, 1970, to the following:

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